INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1, 2
Statutes Involved	3
Statement	3, 4
Specification of Errors to Be Urged	5
Reasons for Granting the Writ	6-9
Conclusion	9
Appendix	10

CITATIONS

Cases:

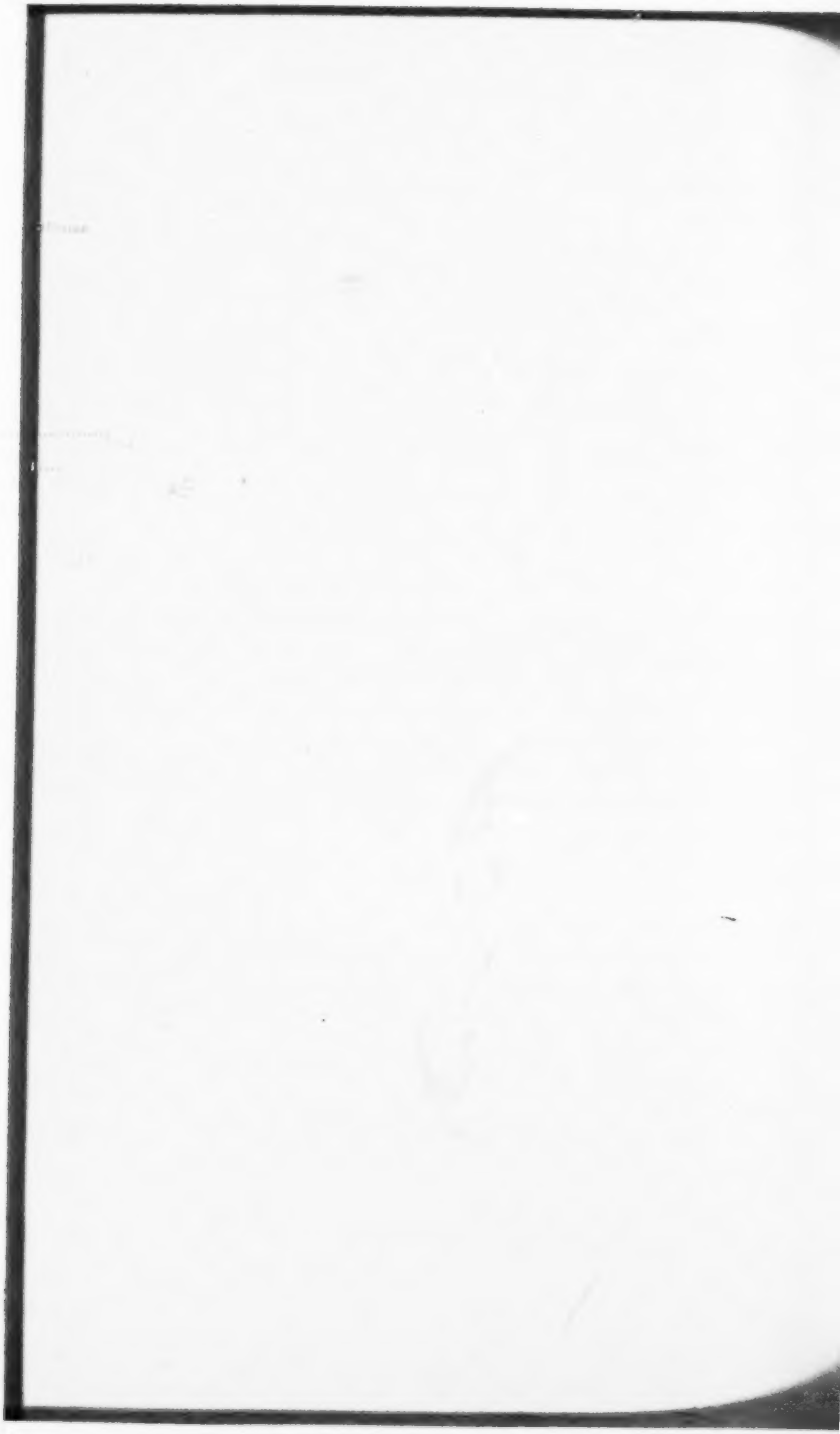
Cardillo v. Liberty Mutual Insurance Co., 330 U. S. 469	6
DelVecchio v. Bowers, 296 U. S. 280	6, 8
Marro Bros. v. Cardillo, 154 Fed. 2d 357 (1946)	8
Matter of Eldridge v. Endicott Johnson & Co., 228 N. Y. 21, 25, 126 N. E. 254, 20 A. L. R. 1	7
New Amsterdam Casualty Co. v. Hoagh, 46 Fed. 2d 837	7
Voehl v. Indemnity Insurance Co., 288 U. S. 162, 166	6
Wheeling Corrugating Co. v. McManigal, (CCA) 41 F. (2d) 593-594	7

Statutes:

The Longshoremen's & Harbor Workers' Compensation Act of March 4, 1947 (44 Stat. 1424, U. S. C., Title 33, Chapter 18, sec. 901 et seq). Section 21-B of said Act (33 U. S. C. A. sec. 921 (b))	10
Section 920 of said Act (33) U. S. C. A. sec. 921 (b)	10
Section 2	10
Section 3	10

Miscellaneous:

Opinion of Judge Hall	11-12



PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANNA KWASIZUR, Administratrix of the Estate of Ignatius Kwasizur, Deceased, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on April 28, 1949.

OPINION BELOW

The District Court of the United States for the Eastern District of Pennsylvania rendered two opinions; one by the Honorable Judge Pierson M. Hall on July 25, 1947, and the other by the Honorable Judge James P. McGranery on March 10, 1948. The opinion of the United States Court of Appeals for the Third Circuit dated April 28, 1949, is not reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered on April 28, 1949. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347.

QUESTIONS PRESENTED

1. Whether, the Deputy Commissioner, or the Court below, could determine that a particular injury did not arise out of and in the course of employment, where there is no substantial evidence nor any inference from which he could so find.

2. Whether, as a matter of law, an injury to an employee occurring while at work is not an injury arising out

of and in the course of his employment, within the meaning of the Federal Longshoremen's and Harbor Workers' Compensation Act, where all the claimant's testimony and all the defendants' legally admissible testimony is that the injury did occur in the course of claimant's employment.

3. Whether, as a matter of law, where there is no substantial evidence before the Commissioner to reject the petitioner's claim, is the Commissioner not bound to find for petitioner where claimant was on board a vessel and injured thereon, in view of the Federal Longshoremen's and Harbor Workers' Compensation Act, and the presumption of coverage given the injured by Section 920 of the Act.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, c. 509, 44 Stat. 1424 et seq.; 33 U. S. C. 901 et seq.) are set forth in Appendix, p. 10 *infra.*

STATEMENT

The appellant is the administratrix of the Estate of Ignatius Kwasizur and seeks to recover for an injury sustained by her intestate in his lifetime. Kwasizur claimed compensation prior to his death under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 et seq. The Deputy Commissioner who heard the testimony decided adversely to the plaintiff's claim. He concluded as a matter of law that the injury which he found Kwasizur to have suffered did not arise out of or in the course of the employment from the following findings of fact:

1. That the foreman assigned the said work to the claimant and another employee;

2. That the argument surrounding the assignment of the said work did not result in any bodily injury to the claimant;

3. That also before beginning work, a member of the crew of the said vessel was the victim of an attempted theft of personal property from his clothing as he lay in his bunk in his room;

4. That he grappled with the intruder who succeeded in freeing himself by drawing a knife;

5. That some minutes later, the claimant was found lying on the deck in an unconscious condition as the result of a head injury later diagnosed as a comminuted depressed fracture of the skull about three inches in length;

6. That an open knife was found on the deck beside the claimant's body;

7. That his injury was not due to a fall while walking along the deck in the course of his employment, as he alleged, but was a result of the attempted theft of the sailor's property.

There is no substantial evidence to support the above findings of fact. All of the above findings of fact are based on hearsay evidence introduced by defendant employer of a City detective named Munn. He told about his trip to the ship following the accident and conversations had with the men there. When, upon further questions being asked, he stated that the case had been removed to another detective office because it was out of his (Munn's) district and Munn was permitted to relate what the other detective had reported. All this gets pretty far away.

The Deputy Commissioner having rejected the claim of the injured workman, his claim was then taken to the U. S. District Court for the Eastern District of Pennsylvania pursuant to the provisions of the Statute; 33 U. S. C. A. 921, sub-section (b). It was heard by a visiting Judge who set aside the Commissioner's findings and order because, in his opinion, they were not sustained by the evidence.

The U. S. Attorney filed a petition to reopen the visiting Judge's judgment contending that the Clerk of the Court failed to notify him of the hearing before the visiting Judge.

The claimant specifically denied this allegation by answer filed.

The U. S. Attorney failed to produce any evidence, testimony or depositions in support of his contention of no notice and ordered the case down for reargument before a resident Judge, who heard the case and rendered an opinion contra to the first Judge's view.

An appeal was taken to the United States Court of Appeals for this Circuit District and after reargument an opinion was filed on April 28, 1949 and judgment entered thereon.

In its opinion, the Court of Appeals avoided the question "what a detective said another detective said a witness said would be enough to prove a claim" and the Court stated "we are glad we do not have to decide in this case" and then went ahead and stated the Deputy Commissioner could have disregarded the claimant's testimony, his witness, the direct testimony of the defendants' foreman and could reject the claim of the claimant in that the injury was not suffered in the course of employment and if no further testimony had been presented except that offered on behalf of the claimant, the finding against him could not be disturbed by a Court.

The Court of Appeals, without passing upon Section 920 of the Federal Longshoremen's and Harbor Workers' Compensation Act, more particularly in reference to the presumption of coverage given to the injured by said Section, held that Kwasizur's injury had not arisen out of and in the course of his employment.

The Court of Appeals, by failing to rule on the presumption under Section 920, in effect nullified a provision in the Longshoremen's Act made and provided for by the Act of Congress which gives injured employees the benefit of presumption of coverage under said provision.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Third Circuit erred:

1. In holding as a matter of law that Ignatius Kwasizur's injury did not arise out of and in the course of his employment where there is no substantial evidence to sustain his rejection of petitioner's claim.

2. In holding as a matter of law that Ignatius Kwasizur's injury did not arise out of or in the course of his employment where there is no substantial evidence to support the findings of fact made by the Deputy Commissioner.

3. In holding as a matter of law that Ignatius Kwasizur's injury did not arise out of or in the course of his employment, where the findings of fact are based on hearsay evidence piled upon hearsay, as opposed to direct evidence to the contrary in the record, and the presumption of coverage given to the injured by Sec. 920(a) of the Act.

4. In holding that Ignatius Kwasizur's injury did not arise out of or in the course of his employment and refusing to accord finality to the visiting Judge's findings in this regard (opinion of Judge Hall dated July 25, 1947), as set forth in full in the Appendix, pp. 11, 12, *infra*.

5. In holding that the resident Judge (McGranery) had a right to reopen the case on defendants' petition which was in every detail denied by the claimant and where upon reargument before Judge McGranery no evidence, no testimony and no depositions were taken in support of defendants' petition to open.

6. In reversing the visiting Judge of the District Court, that is, the findings of said Judge as more fully set forth in the opinion of July 25, 1947, where claimant's position was sustained and no appeal at any time thereafter was taken by the defendant, Maritime Ship Cleaning and Maintenance Company, employer, and the insurance carrier, Hartford Accident & Indemnity Company.

REASONS FOR GRANTING THE WRIT

This case presents questions of substantial importance in the administration of the Federal Longshoremen's and Harbor Workers' Compensation Act. The decision below fails to give effect to the applicable decisions of this Court as to the requirement of substantial evidence in order to sustain the Deputy Commissioner's findings of fact in compensation cases and is squarely in conflict with *Cardillo v. Liberty Mutual Insurance Co.*, 330 U. S. 469; *DelVecchio v. Bowers*, 296 U. S. 280, and *Voehl v. Indemnity Insurance Co.*, 288 U. S. 162, 168, and fails to give effect to the provisions of Section 920 of the Act in reference to presumption of coverage given to the injured, and it narrows in an important aspect the protection afforded by the Federal Longshoremen's and Harbor Workers' Compensation Act and the protection afforded by Congress against the hazards of employment.

The substantive question presented—

(a) where there is direct evidence that an employee was injured while working aboard a vessel as opposed by findings of fact based solely on hearsay evidence of an alleged attempt of theft, are the findings of fact an error of law and whether or not an order so based on hearsay evidence is or is not in accordance with law;

(b) where there is no substantial evidence to support the findings of fact of the Deputy Commissioner what benefits accrue to the injured person as to the presumption of coverage under Section 920 of the Longshoremen's and Harbor Workers' Compensation Act.

The Court below was clearly in error since it concluded that it would not face the difficult question of determining how far the Deputy Commissioner can go in basing its findings of fact on hearsay evidence piled on hearsay, and since it did not refer to the direct evidence in the case and totally disregard the presumption of coverage given by Section

920 to the injured and was further in error when it rejected the petitioner's claim by ruling that the injury did not arise out of or in the course of his employment.

The Court below was clearly in error in its conclusion that the Deputy Commissioner did not have to believe the claimant or his witness and by its further erroneous statement that "this foreman put in a claim for compensation on the injured man's behalf, but did so purely as a routine matter without knowledge of the facts of the injury". (Court of Appeals' opinion, page 3.)

The record discloses the foreman who was the defendants' witness (N. of T. pages 39-47 inc.) that he was an eye witness who substantiated most of the basic facts established by the claimant and his witness and that the injury did occur during the execution of an order given by the said foreman and was definitely not during the course of any alleged attempted theft by the said claimant of a seaman.

The injection of the alleged theft of a seaman, who was never produced, by the claimant, was given by defendants' witness who was not present, but who received a statement from another detective who was not produced. To infer that claimant was running away from a fight with a seaman is to indulge in pure conjecture, inconsistent with the established facts and an award based upon conjecture inconsistent with established facts and circumstances is manifestly so arbitrary and unreasonable as to be "not in accordance with law."

See

Wheeling Corrugating Co. v. McManigal, (CCA), 41 F. (2d) 593-594;

Matter of Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 25, 126 N. E. 254, 20 A. L. R. 1;

New Amsterdam Casualty Co. v. Hoage, 46 Fed. (2d) 837.

The Court below was in error in holding as a matter of law that the Deputy Commissioner could disbelieve the

claimant and his witness and the defendants' foreman—could draw inferences from hearsay evidence piled upon hearsay evidence and disregard Section 920 of the Act of Congress of the Federal Longshoremen's and Harbor Workers' Compensation Act, which reads as follows:

> "PRESUMPTIONS
>
> Sec. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) that the claim comes within the provisions of this Act."
>
> *Marro Bros. v. Cardillo*, 154 F. (2d) 357 (1946).

In the case of *DelVecchio v. Bowers*, 296 U. S. 280 (1935), the Court held, at page 284

> "The court found the evidence as consistent with accident as with suicide and said that in such circumstances the presumption required a finding in favor of the claimant; adding that whatever measure of proof may generally suffice to support other findings of a deputy commissioner, a finding of suicide, in the absence of substantial evidence, is not in accordance with law. Substantial evidence, said the Court, must be such as to induce conviction and the evidence upon which the officer here acted did not reach that standard".

The Court below erred in holding as a matter of law that the resident District Judge exercised proper discretion in reopening the case.

The visiting Judge found that there was no evidence to sustain the Deputy Commissioner's findings of fact or that the Deputy Commissioner had any substantial evidence to reject the injured man's claim.

The United States Attorney filed a petition some five weeks after the decision alleging that it did not receive

notice of the original hearing of the visiting Judge. Claimant's answer specifically denied that the United States Attorney did not receive written notice from the Clerk of the Court and further attached a copy of the notice sent by the Clerk to the respective attorneys in the case.

The case was argued before the resident Judge with no testimony, no depositions and no evidence presented as to the failure to receive the notice, but based solely on Petition and Answer.

The resident Judge reopened the case. This was abuse of discretion on the part of the Court below in so finding.

The Court below was in error as a matter of law in deciding that the judgment of the visiting Judge, as to the employer, Maritime Ship Cleaning and Maintenance Company and the insurance carrier, Hartford Accident and Indemnity Company, was not a final judgment from which no appeal had been taken.

Judgment was rendered by the visiting Judge in an opinion filed on July 25, 1947. Nothing further was done either by the employer, Maritime Ship Cleaning and Maintenance Co. or the insurance carrier, Hartford Accident and Indemnity Co., until the U. S. Attorney, on behalf of the Government, on Sept. 5, 1947, filed a petition to reopen, which petition was merely signed by the attorney for the employer and the insurance carrier.

The judgment as to the employer and the insurance carrier was final and conclusive on Aug. 25, 1947, that is within thirty days from the date of the judgment rendered by the visiting Judge.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

E. HERMAN FUIMAN,

Attorney for Petitioner.

E Herman Fuiman

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. 901 et seq.) provides in part:

Sec. 2, Definitions.—When used in this Act—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

Sec. 3. COVERAGE—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States. . . .

Sec. 20. PRESUMPTIONS—In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary, (a) that the claim comes within the provisions of this Act.

Sec. 21. REVIEW OF COMPENSATION ORDERS—(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred. . . .

OPINION OF JUDGE HALL

Judgment and Decree

HALL, *J.*

On this review of the Commissioner's rejection of Petitioner's claim under the Longshoremen's and Harbor Workers' Compensation Act, the Court is bound to uphold the Commissioner's conclusion if there is any substantial evidence in the record to sustain it. Or stated conversely, the rejection cannot be set aside unless there is no substantial evidence in the record to sustain it. A certified copy of the transcript of the testimony before the Commissioner is in evidence, and there is nothing in the record before me to indicate that there was any other evidence before the Commissioner.

No matters are in issue except as to whether or not the injury arose out of and in the course of employment.

I am satisfied that there was no substantial evidence before the Commissioner to sustain his rejection of petitioner's Claim.

Without restating the testimony, it is sufficient to say (and both counsel agreed) that the only evidence in the record to sustain the rejection was the testimony of the Detective Munn.

The testimony of Munn as to his conversation with Noblett is pure hearsay, and is not substantial evidence. This is particularly so in view of the direct evidence to the contrary in the record, and the presumption of coverage given the injured by Sec. 20(a) of the Act.

The testimony of Munn as to the report of another detective is hearsay upon hearsay and is not substantial evidence. If admissible at all it would be limited safely to showing a prior inconsistent statement of Kwasizur.

Thus if it is assumed that the Commissioner disbelieved both Kwasizur (the injured man, now deceased) and his witness Levitsky, it would leave only the testimony of the witness Rodak (the foreman) in the record, in view

of the fact that the testimony of Munn must be disregarded as not substantial as indicated above.

By Rodak's testimony, the deceased was injured at least ten minutes after Noblett's complaint of the attempted theft (and not immediately after as claimed by the government) and was injured by the fall within a "minute" after the deceased, in obedience to Rodak's orders, started walking toward No. 3 hatch. He was thus injured in the course of his employment. This direct evidence is supported by the presumption in favor of the petitioner. And there being no substantial evidence in the record to the contrary, the rejection is not in accordance with law and the petitioner is entitled to the relief asked.

It is therefore adjudged and decreed that:

The order of the Commissioner is vacated and set aside and the matter remanded to the Commission, and the Commission is ordered and directed to calculate and make an award of compensation to petitioner in accordance with this decree.

/s/ PEIRSON M. HALL,
Judge.

July 25th, 1947.